United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia

No. 20,279

DAVID A. SMITH, et al,

[illegible]708

Appellants

DISTRICT OF COLUMBIA,

Appellees.

Appeal From The District of Columbia
Court of Appeals

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals erred in holding that leave of Court was not required before the prosecuting officer may enter a nolle prosequi as is required by Rule 48(a) of the Federal Rules of Criminal Procedure.

2. Whether the District of Columbia Court of Appeals erred in affirming the trial Court's application of a rule of absolute (rather than "almost absolute," as the District of Columbia Court of Appeals formulated the rule), power of the prosecutor to enter a nolle prosequi and, thereby denying the appellants any opportunity to show that the nolle prosequi was oppressive or arbitrary.

3. Whether the District of Columbia Court of Appeals erred in holding that the single count informations in this case were not duplicitous and therefore defective notwithstanding the prosecutor who drew the information and tried the case clearly and unequivocally stated to the trial court his intent and purpose the charge and try appellants under two separate and distinct criminal statutes.

4. Whether the District of Columbia Court of Appeals erred in holding that the only offense charged in the information herein was the proscribed by D.C. Code, 1961, § 22-1121, notwithstanding a contrary expressed intent by the prosecutor and the apparent understanding of the Chief Judge in sentencing a defendant charged with appellants who entered a plea of "Guilty" (R. 80) and the trial judge in sentencing appellants (R. 61) for violation of D.C. Code, 1961, § 22-3111.

5. Whether the District of Columbia Court of Appeals erred in holding that the evidence was sufficient to sustain the convictions of the appellants for violation of D. C. Code, 1961, #22-1121, and abridging rights guaranteed the appellants by the First and Fifth Amendments to the Constitution of the United States.

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BRIEF FOR APPELLANTS

Jurisdictional Statement

This is an appeal from a judgment of the District of Columbia Court of Appeals pursuant to 56 Stat. 196, ch. 207, #8(D.C. Code 1961, #11-773). This Court en banc, by order entered December 12, 1966, granted appellants' petition for allowance to appeal from the judgment of the District of Columbia Court of Appeals in cases number 3815 through 3824." By further order of this Court, entered to and including January 20, 1967.

STATEMENT OF THE CASE

On March 16, 1965, informations were filed in the trial court by the United States Attorney for the District of Columbia (Nos. U.S. 2382-65, and 2384-65) charging Unlawful Entry in violation of Section 22-3102 of the District of Columbia Code (1961 Edition), in that appellants,

> "by being in a public building, namely, the House side of the United States Capitol Building, without lawful authority to remain therein, did refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, against the form of the statute in such case made and provided, and against the peace and Government of the United States."

(Tr. 64). Upon arraignment on March 16, 1965, appellants entered pleas of "Not Guilty" and made request for trial by jury and the cases were transferred to the Jury Branch of the trial court.

When the cases were called on June 10, 1965, for jury trial, before Judge Scalley, the Government nolle prossed Information Nos. U.S. 2382-65, 2383-65, and 2384-65 and filed Information Nos. U.S. 5049-65 and 5050-65, charging Disorderly Conduct in violation of Title 40, U.S.C. Section 101, in that appellants,

> "while in a public building belonging to the United States within the District of Columbia, namely, the United States Capitol building, did engage in disorderly and unlawful conduct, that is, did congregate and assemble in said United States Capitol building and engage in loud and boisterous talking and other disorderly conduct, and did with intent to provoke a breach of the peace and under such circumstances that a breach of the peace might be occasioned by their conduct, act in such a manner as to annoy, disturb, interfere with, obstruct, or

> be offensive to others against the form of the statute in such case made and provided, and against the peace and Government of the United States of America."

(Tr. 64). Appellants were arraigned before Judge Beard of the court below, entering pleas of "Not Guilty," demanded trial by jury, and the cases were continued until June 15, 1965, with leave to file any appropriate motions, (Tr. 64).

On June 15, 1965, at 11:15 a.m., appellants appeared before Chief Judge Smith and move to dismiss the informations for want of jurisdiction and indicated their desire to press their demand for jury trial, to which the Government had filed, "Opposition," (Tr. 64-65). After argument by counsel on the motion to dismiss (Tr. 64-71), the Court recessed until 3:00 p.m. that afternoon.

Upon resumption of the proceedings and in the absence of petitioners or their counsel, the United States Attorney moved to enter a nolle prosequi of the pending informations and the Corporation Counsel for the District of Columbia requested that the Chief Judge, because the D. C. Branch of the Criminal Division of the District of Columbia Court of General Sessions was then engaged in a trial, arraign petitioners upon new informations in which the District of Columbia charged them with disorderly conduct. The Chief Judge, over objection of petitioners' counsel to the entire proceedings, granted the United States Attorney's motion to enter a nolle prosequi of the pending informations, allowed the Corporation Counsel to file the new informations, denied petitioners' motions to dismiss the new informations,

arraigned petitioners upon the new informations, received their pleas of "Not Guilty," and continued the cases for trial the following morning in the District of Columbia Branch of the Criminal Division of the District of Columbia Court of General Sessions (R. 75-79).

Petitioners' cases were heard by the trial judge, sitting without a jury, and at the outset petitioners renewed their motion to dismiss upon the grounds previously urged and requested that the prosecution be required to specify under what section of the Code it intended to proceed--i.e., the general trespass statute [D.C. Code 1961, § 22-3102] or the statute specifically relating to disorderly conduct in or about public buildings or public grounds belonging to the United States within the District of Columbia [D.C. Code 1961, § 22-3111] (R. 6). The prosecuting attorney responded that "We are relying upon both statutes insofar as the particular violation is concerned. And the Information ... covers both situations . . . . "Whereupon the Court denied petitioners' motion (R. 6-7).

In the trial, the prosecution produced evidence that on March 15, 1965 petitioners entered the United States Capitol to present a petition to House Speaker McCormack. The Speaker saw the petitioners, accepted the petition and a book, and then returned to his office (R. 8). The petitioners then assembled in an alcove, or public corridor, on the second floor near the House Chambers and were told by the Chief of the United States Capitol Police that they would have to leave the building "no later than 6:00 p.m.,"

inasmuch as the Capitol was to be secured for a visit by the President of the United States (R. 9-12, 35, 41, 46, 50). At some time prior to 6:00 p.m. the petitioners began to sing, shout and clap their hands (R. 9, 16 - 17) and this conduct continued for a short time when the officer in charge, Chief Schamp, ordered the petitioners removed from the building (R. 12, 14, 20, 24), pursuant to which order they were forcibly ejected from the Capitol and deposited on the sidewalk by members of the Capitol Police Force and thereafter were taken into custody, along with several other persons then and there present, by members of the Metropolitan Police Department (R. 13, 17, 21-22, 24, 26).

On June 17, 1965, petitioners were convicted of disorderly conduct and sentenced under D. C. Code 1961, § 22-3111, upon the advice of the prosecuting attorney, to the maximum penalty provided therein, "$50.00 or 10 days as to each Defendant." (R. 58-61). Petitioners appealed to the District of Columbia Court of Appeals, which Court on June 1, 1966 unanimously affirmed their convictions and sentences and on June 16, 1966 denied a Motion for Rehearing. This appeal from the judgment of the District of Columbia Court of Appeals followed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, the text of which is set forth in an appendix, infra. pp. 26-29.

Article of Amendment I, Constitution of the United States

Article of Amendment V, Constitution of the United States

D. C. Code, 1961, § 22-109.

D. C. Code, 1961, § 22-1107.

D. C. Code, 1961, § 22-1121.

D. C. Code, 1961, § 23-101.

Fed. R. Crim. P. 48(a), 18 U.S.C.

Statement of Points

Appellants intend to rely upon the following points on appeal:

1. That the District of Columbia Court of Appeals erred in holding that leave of court was not required before the prosecuting officer could enter a nolle prosequi as is required by 48(a) of the Federal Rules of Criminal Procedure.

2. That the District of Columbia Court of Appeals erred in affirming the trial court's application (rather than an "almost absolute", as the District of Columbia Court of Appeals formulated the rule), of a rule of absolute power of the prosecutor to enter a nolle prosequi, thereby denying the appellants any opportunity to show that the nolle prosequi was oppressive or abritrary.

3. That the District of Columbia Court of Appeals erred in holding that the single count informations in this case were not duplicitous and therefore defective notwithstanding the prosecutor who drew the information and tried the case clearly and unequivocally stated to the trial court his intent and purpose to charge and try appellants under two separate and distinct criminal statutes.

4. That the District of Columbia Court of Appeals erred in holding that the only offense charged in the information herein was that proscribed by D. C. Code, 1961, #22-1121, notwithstanding a contrary expressed intent by the prosecutor and the apparent understanding of the Chief Judge in sentencing a defendant charged with appellants who entered a plea of "Guilty" and the trial judge in sentencing the appellants for violation of D. C. Code, 1961, #22-3111.

5. That the District of Columbia Court of Appeals erred in holding that the evidence was sufficient to sustain the convictions of the appellants for violation of D. C. Code, 1961, #22-1121, thereby abridging rights guaranteed the appellants by the First and Fifth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. The District of Columbia Court of Appeals erred in holding that leave of court was not required before a prosecutor in the Court of General Sessions could enter a nolle prosequi. The result of 48(a) is constitutionally compelled in the Court of General Sessions. In addition 48(a) represents a federal public policy which the Court of General Sessions is bound to apply. Even if the result of 48(a) is not compelled, this court, exercising its supervisory powers over that court, should compel the result of 48(a) to prevent an obvious discrimination and unequal application of the law in federal courts in the District of Columbia.

2. The District of Columbia Court of Appeals erred in affirming the application by the trial court of a rule of absolute power of the prosecutor to enter a nolle prosequi. The District of Columbia Court of Appeals announced a common law rule which it held applicable to the District of Columbia in the Court of General Sessions which is not absolute, but in the words of the court below, "almost absolute." The prosecutor's power to enter a nolle prosequi is subject to judicial restraint as that right is arbitrarily or oppressively used. This rule announced by the District of Columbia Court of Appeals was not the rule applied by the trial court. The trial court applied a rule of absolute right of the prosecutor to enter a nolle prosequi, and effectively denied appellants any opportunity to demonstrate the evidentiary fact of arbitrary and oppressive conduct by the prosecutor and concluded the fact against the appellants because the contrary of the presumption which the court indulged in was not shown by the appellants.

3. The District of Columbia Court of Appeals erroneously concluded that the single court informations were not duplicitous. The record is clear that the prosecutor, who prepared and filed the informations, intended and did charge the violation of at least two separate offenses requiring proof of different elements and providing for different penalties.

4. The District of Columbia Court of Appeals, by determining upon appellate review that petitioners were charged with an offense other than that which the prosecutor who prepared the informations said he intended to charge them with, and other than that which the Chief Judge considered applicable in imposing a sentence, and other than the one upon which the trial judge tried, convicted and sentenced the appellants, clearly denied the petitioners due process.

5. The District of Columbia Court of Appeals erred in holding the evidence was sufficient to sustain a conviction as a violation of D.C. 1961, § 22-1121. Beyond being insufficient as a matter of law, to hold that appellants' conduct violated the D.C. Code denies the appellants protected First Amendment rights. An application of D.C. Code, 1961, § 22-1121 to the instant facts makes the statute fatally defective for vagueness and effects a denial of due process.

ARGUMENT

I

LEAVE OF COURT MUST FIRST BE OBTAINED BEFORE A PROSECUTING OFFICER IN THE COURT OF GENERAL SESSIONS MAY ENTER A NOLLE PROSEQU

The court below at page 3 of its opinion acknowledges that "In federal courts the common law rule of absolute authority [of prosecutors to enter a nolle prosequi in a criminal charge at any time after the filing of an information and before trial] has been qualified by adoption of Rule 48(a) of the Federal Rules of Criminal Procedure which requires that leave of court be first obtained before the prosecuting officer may enter a nolle prosequi." But that Court held, "This federal rule is, however, not applicable in the Criminal Division of the District of Columbia Court of General Sessions and its counterpart has not been adopted there. We are therefore guided by the dictates of the common law rule which confers not absolute power upon the prosecutor to nol-pros informations in criminal trials in the Court of General Sessions but 'almost absolute' power, subject only to judicial restraint if that right is arbitrarily or oppressively used."

Appellants cannot agree that this Court, in seeking guidance for its supervision of the District of Columbia Court of General Sessions would be acting wisely or properly in making a choice in favor of a common law rule as against a rule of federal policy specifically promulgated by the Supreme Court of the United States and approved by Congress for subordinate federal courts.

To the extent that the Federal Rules of Criminal Procedure are held to represent the codification of constitutional principles of due process of law and national policy for application in criminal proceedings in federal courts, the decision by the court below, which denies the application of those minimum safeguards to defendants in criminal proceedings in the District of Columbia Court of General Sessions in the absence of that court's formal adoption of any of those Rules, condones a lesser or different standard of due process in the D.C. Court of General Sessions, than obtains in the United States District Court. Thus, a defendant in a criminal case in two courts having concurrent jurisdiction in certain cases, is afforded procedural safeguards in one court by virtue of the operative effect of the Federal Rules of Criminal Procedures, which are denied him in the other court simply because the second court has not expressly adopted the counterpart of such Rules. See United States v. Kennedy, 220 A.2d 322 (D.C.C.A. June 17, 1966).

The purpose of Rule 48(a) is to prevent harrassment of a defendant by charging,dismissing and re-charging without placing a defendant in jeopardy. Wooding v. United States, 311 F.2d 417 (1963). Like 48(b) Rule 48(a) is a contemporary enunciation of a constitutional right. United States v. Palermo, 27 F.R.D. 393.

These rules being congressionally enacted are legislation transcending a mere rule of court. United States v. Janitz, 6 F.R.D. 1. As this court has stated, the Federal Rules of Criminal Procedure have the force of statute and abrogate contrary rules of common law. Rattley v. Irelan, 90 U.S. App.D.C. 343, 197 F.2d 585.

In United States v. Shanahan, 168 F. Supp. 225, the court observed:

> Apparently, the rule as submitted to the Supreme Court by the Committee as shown by the print that was published at that time--gave the Attorney General or the United States Attorney a right to dismiss without leave of court, but required that there be filed a statement of reasons for the dismissal. The Supreme Court, however, revised the rule and adopted it as it now reads, that no statement of reasons is required but that leave of court must first be obtained. New York University School of Law, Institute Proceedings Vol. VI, pp. 170, 171 (1946).
>
> In view of the above, the conclusion would seem inescapable that the Supreme Court, in approving Rule 48(a) in its present form, was expressing in positive fashion its belief that entry of a nolle prosequi by the Government is a permissive right only, requiring in all cases the approval of the court in the exercise of its judicial discretion. Apparently this view had some support prior to the adoption of the present rule. To view the rule otherwise, as urged by the United States Attorney in this matter, would render meaningless that part of the rule requiring leave of court to dismiss an indictment, information or complaint.

Certainly it must be conceded that 48(a) represents a Federal public policy enacted by Congress. What the Supreme Court held as to rule 41(e) is appropo to the instant case.

> The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings. Rea v. United States, 350 U.S. 214, 217.

The District of Columbia Court of General Sessions cannot apply a common law rule in derrogation of federal public policy. Hurd v. Hodge, 334 U.S. 24, 35.

II

THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN AFFIRMING THE APPLICATION BY THE TRIAL COURTS OF A RULE OF ABSOLUTE POWER OF THE PROSECUTOR TO ENTER A NOLLE PROSEQUI

It is the appellants' further position that if this Court does not compel the result of 48(a), and agrees with the District of Columbia Court of Appeals:

> . . . Traditionally the prosecuting attorney has had the power to enter a nolle prosequi in a criminal charge at any time after the filing of an information and before trial without the approval of the trial judge or the consent of the accused. . . . His [prosecutor's] right to enter a nolle prosequi was subject to interference by the court only if that right was used oppressively or arbitrarily or exercised in a manner that was scandalous, corrupt, capricious, or vexatiously repetitious. . . .We are therefore guided by the dictates of the common law rule which confers not absolute power upon the Prosecutor to nol-pros informations in criminal trials in the Court of General Sessions but 'almost absolute' power, subject only to judicial restraint if that right is arbitrarily or oppressively used. [emphasis supplied]

the judgment affirming the convictions here should be reversed because the trial court did not apply the rule announced by the appellate court.

The record below clearly shows that trial court failed to apply the test as announced by the District of Columbia Court of Appeals in its determination that the United States Attorney could enter a nolle prosequi of informations U.S. 5049-65 and 5050-65 in the instant matter. The Court stated (R. 76):

> The Government may nolle pros at any time Mr. Reid. That is up to the Prosecutor.
>
> . . . . I do not interfere with the Government action on nolle prossing at any time since the trial has already started. That is the function of the Prosecutor. So the case has been properly nolle prossed so far as this Court is concerned as to the U. S. charges. . . . [emphasis supplied]

Thus, the Court allowed the U. S. charges to be nolle prossed and ruled that the Prosecutor's power to do so was absolute and subject to no interference by the Court, even when "the trial has already started."

Manifestly, the trial court failed to exercise its discretion, however limited it may be, because the trial court assumed that it did not have any discretion to exercise.

Further, at page 3 of the Opinion, the District of Columbia Court of Appeals held that:

> . . . In the present case there is no evidence that the nolle prosequi of the informations charging disorderly conduct was either arbitrary or oppressive to appellants.

Appellants concede that the record is devoid of any evidence tending to prove that the nolle prosequi was arbitrary or oppressive, but submit that the trial court refused to allow the taking of evidence on the issue, apparently upon the theory that, even if such were the case, the unlimited power of the prosecutor to nol-pros could not be constrained by the Court. This is indicated by the following dialogue between counsel or appellants and the court (R. 76):

> MR REID: . . . As I understood it at recess it was still before Your Honor and we have a number of things we want to say concerning it.
>
> THE COURT: Well in that case, if the case is nolle prossed would that dispose of your motion?

The court then proceeded to summarily dismiss, without argument, two motions to dismiss (R. 77 and 79), apparently upon the theory that the court lacked jurisdiction to rule on these motions (R. 77). The absence of evidence that would tend to prove the nolle prosequi was arbitrary or oppressive was then used by the Court below as a basis for a finding that it was not, even though the appellants were denied an opportunity to present such evidence. This was clearly a denial of fundamental guarantees of due process. In the posture of the matter the appellants were successfully denied their day in court on the issue which the appellate court announced as relevant but which the trial court foreclosed by its inconsistent position. In re Oliver, 333 U.S. 257 (1948).

III

THE SINGLE COUNT INFORMATIONS WERE DUPLICITOUS AND THEREFORE DEFECTIVE

The District of Columbia Court of Appeals erroneously concluded that the single count informations were not duplicitous. The record clearly evidences that appellants were tried and convicted under a single count information which charged a violation of three separate and distinct statutes (R. 82), as an examination of the information and of D.C. Code, 1961, §§ 32-3111, 22-1107 and 22-1121 clearly indicates. The information charged that appellants:

> [a]...being in a public place to wit, the United States Capitol did then and there engage in disorderly conduct....

This language is almost haec verba the offense prohibited by D.C. Code, 1961, § 22-3111.

> [b]...to wit, did engage in loud and boisterous talking and other disorderly conduct....

D.C. Code, 1961, § 22-1107 provides in part:

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble... in or around any public building... and engage in loud and boisterous talking or other disorderly conduct.... [emphasis supplied]

> [c]...to wit, under circumstances such that a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby--
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others...

When asked prior to trial, what statute the prosecution would rely upon, the prosecutor, who prepared and filed the information stated (R. 6):

> Your Honor, these particular informations are drawn under both statutes. One has to do with Federal Government Buildings. The other has to do with being loud and boisterous in any public place, so that we are relying upon both statutes in so far as the particular violation is concerned.
>
> And the information, you will note, covers both situations, both having to do with being loud and boisterous, along with the proposition that it alleges a Federal Government building. [emphasis supplied]

Further, when the appellants had been adjudged guilty of the offense "as charged," the following discussion took place between the court and the prosecutor, (R. 61):

> THE COURT [Neilson, J.]: . . . What is the penalty in this case, Mr. King?
>
> MR. KING: Your Honor, there's two sections involved. In view of that fact, I would relate to Your Honor the maximum penalty of the one having the least, which is $50.
>
> THE COURT: Is there any jail sentence?
>
> MR. KING: No, Your Honor. [emphasis supplied]

The record thus leaves no doubt that the prosecutor, who prepared and filed the informations, intended to charge and did charge the violation of at least two separate offenses requiring proof of different elements and providing for different penalties.

The rule as stated by the then District Judge Tamn in United States v. Bachman, 164 F.Supp. 898, 900 (D.C. 1958):

> There is no doubt, or dispute, that each count of an indictment must contain no more than one offense, and if there are two or more separate and distinct offenses charged in one count, the indictment becomes subject to a motion to dismiss.

See also United States v. Woodson Company, 198 F.Supp. 582, 586 (D.C. 1961).

IV

THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN CONCLUDING THE INFORMATION CHARGED ONLY A VIOLATION OF D. C. CODE, 1961, § 22-1121

The prosecutor's reference to Federal Government buildings and the wording of the informations (R. 82, 90, 98, 106, 114, 122, 130, 138, 146, 154), indicate that D. C. Code, § 22-3111 was one of the intended statutes for it is the only disorderly conduct statute which refers to a Federal Government building. The second code provision he intended to involve must have been D. C. Code, § 22-1107, for only this statute proscribes loud and boisterous talking in any public place.

Thus, the prosecutor was not even aware and did not inform appellants' counsel, or the court, that any charge under D. C. Code § 22-1121 was alleged.

Notwithstanding, the District of Columbia Court of Appeals at pages 4 and 5 of its opinion concluded that

> The unambiguous language of the information clearly discloses that the only substantive offense with which appellants were charged was that prohibited by § 22-1121.

It is instructive to note that if the informations clearly charge a violation of only § 22-1121, then the convictions herein surely must be revised for the informations charge, and the evidence proves that the entire incident occurred within the United States Capitol building and the only statute which arguably could apply to the facts herein is § 22-3111 which the District of Columbia Court of Appeals has so held. Feeley v. District of Columbia, 220 A. 2d 325, 330 (D. C. C. A. 1966); Jabbert v. United States, 221 A. 2d 94, 98 (D. C. C. A. 1966).

The record unequivocally shows the prosecutor's intent to charge a violation under D. C. Code 1961, § 22-1107 and § 22-3111 (V, supra) and he does not suggest any reference to or reliance upon § 22-1121. Both the Chief Judge, in sentencing one of those charged with petitioners who entered a plea of "guilty" (R. 80) and the trial judge, in sentencing petitioners (R. 61), imposed a $50 fine which they understood to be the maximum penalty allowed for the violation charged, but which is the maximum penalty prescribed only by D. C. Code 1961, § 22-3111.

It is submitted that the court below, by determining upon appellate review that petitioners were charged with an offense other than that which the prosecutor who prepared the informations said he intended to charge them and other than that for which the Chief Judge imposed a sentence and the trial judge tried, convicted and sentenced petitioners, in a clear violation of due process.

Left standing, if this Court does not apply its supervisory and corrective process to the decision by the court below, is an apparent holding that a prosecutor may charge and the defendant may be tried and found guilty and sentenced by the trial court for a violation of one provision of the District of Columbia Code and, on appeal, have a determination made that the defendant was convicted for a separate and distinct violation. In the language of the Supreme Court in Cole v. Arkansas, 333 U.S. 196, 200-201 (1948):

We therefore have this situation. The petitioners read the information as charging them with an offense under § 2 of the Act, the language of which the information had used. The trial judge construed the information as charging an offense under § 2. He instructed the jury to that effect. He charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense "of using force and violence." Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in § 1. Yet the State Supreme Court refused to consider the validity of the convictions under § 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted.

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 273, decided today, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. Oregon, 299 U.S. 353, 362.

V

THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS AS VIOLATIONS OF D.C. CODE, 1961, § 22-1121

As was noted above, the prosecutor, who prepared and filed the informations, did not intend to charge violations of D.C. Code, 1961, § 22-1121. Nor does the record reflect evidence which would support a conviction for such offense.

Whatever the petitioners'conduct was, it could not be such as to "annoy, disturb, interfere with, obstruct or be offensive to others," for petitioners were located in an alcove which obviously prevented them from interfering with or obstructing others; and at the time they "lay on the floor and engaged in hand-clapping, song-singing, foot-stamping and shouting" (Opinion, Page 5), no one was in the United States Capitol save the police and several news reporters (R. 27).

The facts of this case bring the petitioners within the ambit of protection of the First Amendment, for they were petitioning their government for redress of grievances. And as the Supreme Court has frequently and consistently held, even if their conduct - of the identical type disclosed herein - annoyed, disturbed or was offensive to others, such conduct could not be a basis for charging and convicting them of disorderly conduct, or other restraint upon the exercise of their First Amendment rights. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Fields v. South Carolina, 375 U.S. 44,

84 S.Ct. 149, 11 L.Ed.2d 107 (1963); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 667 (1963); Brown v. Louisiana, 86 S.Ct. 719 (1965). It is therefore clear that petitioners' conviction for the conduct which the court below finds to be "Clearly...the type prohibited by § 22-1121" would under the circumstances of this case and the decisions of the Supreme Court result in an unconstitutional application of the statute. And the record is void of any other conduct by petitioners which would be proscribed by D.C. Code 1961, § 22-112 Thus, their convictions are in violation of the Due Process Clause of the Fifth Amendment, Thompson v. Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961).

Moreover, if this Court finds that § 22-1121 does apply to the facts of this case the statute must be declared violative of the Fifth Amendment. Under the statute it is an offense to "act in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others" under circumstances such that a breach of the peace may be occasioned thereby. The words employed are too vague and indefinite to pass constitutional muster under the test of Cox v. Louisiana, supra, or Edwards v. South Carolina, supra, for "[T]hese decisions recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility... This...'makes a man criminal simply because his neighbors have no self control and cannot refrain from violence.' Ashton v. Kentucky, 86 S.Ct. 1407, 1410 (1966). Further, under the statute the test is not the conduct of the appellants

but the effect their conduct has upon others. Such a statute is constitutionally unpermissible when First Amendment rights are involved. Terminiello v. Chicago, 337 U.S. 1, (1948); De Jonge v. Oregon, 299 U.S. 353 (1937); Cantwell v. Connecticut, 310 U.S. 296(1940); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Ashton v. Kentucky, supra.

CONCLUSION

WHEREFORE, appellants pray the the judgment below be reversed.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article of Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article of Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES AND RULES

D.C. Code, 1961, §§ 22-109. Prosecutions.

All prosecutions for violations of section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of section 22-1121 or any of the provisions of this Act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse of the District of Columbia for a term not exceeding six months for each and every offense. The second sentence for this section shall not apply with respect to any violation of section 22-1121(b). (July 29, 1892, 27 Stat. 325, ch. 320, §§ 18, June 29, 1953, 67 Stat. 93, ch. 159, §§ 202(a)(2), 211(b).)

D. C. Code, 1961, §§ 22-1107. Unlawful assembly--Profane and indecent language.

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street

avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, ... and engage in loud and boisterous talking or other disorderly conduct, ... under a penalty of not more than $250 or imprisonment for not more than ninety days or both for each and every such offense. (July 29, 1892, 27 Stat. 323 ch. 320, §§ 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210.)

D. C Code, 1961 §§ 22-1121. Disorderly conduct--generally.

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby--

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; . . . . shall be fined not more than $250 or imprisoned not more than ninety days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211a.

D. C. Code, 1961, §§ 22-3111. Disorderly conduct in public buildings or grounds--Injury to or destruction of United States property.

Any person guilty of disorderly and unlawful conduct in or about the public buildings and public grounds belonging to

the United States within the District of Columbia. . . shall, upon conviction thereof, be fined not more than fifty dollars. (July 29, 1892, 27 Stat. 325, ch. 320, § 15.)

D. C. Code, 1961, § 23-101. Conduct of prosecutions--Party plaintiff

The attorney for the District of Columbia shall be known as the corporation counsel.

Prosecutions for violations of all police or municipal ordinances or regulations, and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 932; June 30, 1902, 32 Stat. 537, ch. 1329.)

Fed. R. Crim. P. 48(a), 18 U.S.C. Dismissal--By Attorney for Government.

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,279

DAVID A. SMITH, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
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QUESTIONS PRESENTED

In the opinion of appellee, the questions presented are:

1. Are the Federal Rules of Criminal Procedure applicable in misdemeanor cases in the District of Columbia Court of General Sessions?

2. Under the circumstances involved, were appellants prejudiced by the failure of the Court of General Sessions to accord them an evidentiary hearing on whether, under the applicable common law rule, the entry of nolle prosequis by the United States Attorney to disorderly conduct informations was arbitrary and oppressive?

3. Are the disorderly conduct informations upon which appellants were tried and convicted fatally duplicitous?

4. Are appellants' convictions of disorderly conduct supported by the evidence and do such convictions infringe their First and Fifth Amendment rights?

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CASES CITED

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1961, CITED

RULES OF COURT CITED

ACTS OF CONGRESS CITED

OTHER AUTHORITY CITED

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* Cases and authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,279

DAVID A. SMITH, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

At about 6:00 p. m. on March 15, 1965, appellants were arrested in the United States Capitol. On the following morning, in informations filed in the Court of General Sessions by the United States Attorney, they were charged with unlawful entry in violation of D. C. Code, 1961, § 22-3102. Upon their arraignments the same day, they pleaded not guilty and demanded jury trials. The cases were thereafter continued to June 10, 1965, for trial. (J. A. 64.)

On June 10, 1965, the United States Attorney nol prossed the unlawful entry informations and filed informations charging appellants with disorderly conduct, upon which they were arraigned and pleaded not guilty. The cases were then continued to June 16, 1965. (J. A. 64-71.)

On the morning of June 16, 1965, appellants moved to dismiss the disorderly conduct informations filed by the United States Attorney on the ground that, under D. C. Code, 1961, § 23-101, the prosecutions should have been brought by the Corporation Counsel in the name of the District of Columbia and not by the United States Attorney in the name of the United States. Following argument on the motions, the hearing thereon was recessed until 3:00 p. m. the same day.[1] (J. A. 64-72.)

At 3:00 p. m. on June 16, 1965, when the hearing on the motions was resumed, the United States Attorney requested and was granted leave to nol pros the disorderly conduct informations filed by him, and the Corporation Counsel then filed informations charging appellants with disorderly conduct, upon which they were arraigned and pleaded not guilty (J. A. 73-79).

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[1] The transcript indicates that this occurred on Wednesday, June 15, 1965 (J. A. 63). June 15, 1965, was, however, a Tuesday. The hearing actually occurred on Wednesday, June 16, 1965 (J. A. 78-79).

The informations filed by the Corporation Counsel on June 16, 1965, charged that appellants, on March 15, 1965:

> "* * * in a public place, to wit: U. S. Capitol Building did then and there engage in disorderly conduct, to wit: did engage in loud and boisterous talking and other disorderly conduct, to wit: under circumstances such that a breach of the peace may be occasioned thereby, acted in such a manner as to annoy, disturb, interfere with, obstruct, and be offensive to others * * *." (J. A. 83, 91, 99, 107, 115, 131, 139, 147, 155.)

At trial, on June 17, 1965, four police officers testified for the government and three of appellants and one other person for the defense. Also, several photographs were, without objection, received in evidence (J. A. 11). The record reflects no essential conflict in the testimony respecting the actions of appellants which gave rise to their prosecutions for disorderly conduct.

On the early afternoon of March 15, 1965, appellants, who had previously determined "* * * to participate in demonstrations as a result of several crises" (J. A. 38), went to the United States Capitol and, by prearrangement, assembled outside the office of the Speaker of the House (J. A. 8). The Speaker "* * * was very gracious and came out and saw and heard them" (J. A. 56) and accepted from them a

petition and a book (J. A. 8, 53). The Speaker then suggested that he thought it would be best if they left peacefully (J. A. 53-54).

Frustrated, by the Speaker's prompt and courteous acceptance of their petition, in their efforts to stage a demonstration, appellants then assembled in and around a small alcove off the second floor corridor that leads from the Speaker's office to the House Chamber (J. A. 8, 11-12, 16, 23, 38-39).

Sometime later they were approached by Chief Schamp of the Capitol Police Force who informed them that, because the Capitol was being secured at 6:00 p. m. in preparation for a visit by the President of the United States, they would have to leave the building not later than that time (J. A. 9, 12).

Appellants remained in the alcove and corridor for the rest of the afternoon where they "lay sprawled on the marble floor there" and, from time to time, engaged in "little song-singings" (J. A. 9, 16, 19-20, 27).

At about 5:45 p. m., long after the building had been closed to visitors for the day (J. A. 27), they were again approached by Chief Schamp and requested to leave quietly (J. A. 9, 17, 24). At this time, they began to sing "very loud," to shout, to clap their hands, and to stamp their feet (J. A. 9, 16-17, 24, 26-27).

After the loud and boisterous singing, shouting, hand-clapping, and feet-stamping had continued for some time,[2] Chief Schamp ordered appellants arrested (J. A. 14, 19-20). At this time, appellants threw themselves on the floor, locked arms, and had to be forcibly pulled apart and carried from the building (J. A. 9, 24, 44, 49).

At the conclusion of all the evidence, the court found appellants "guilty as charged" (J. A. 58-59) and sentenced each to pay a fine of $50 or, in default thereof, to serve ten days in jail (J. A. 61). Upon appeal to the District of Columbia Court of Appeals, the judgments of conviction were affirmed. Smith v. District of Columbia, 219 A. 2d 842.

SUMMARY OF THE ARGUMENT

The language of the Federal Rules of Criminal Procedure, the clear intention of their framers, and established case law all make manifest that such Rules were not intended to, and do not, apply in misdemeanor cases in the Court of General Sessions.

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[2] Variously estimated by the police officers to be "several minutes" (J. A. 9), "a good fifteen or twenty minutes or half hour" (J. A. 17), about "fifteen minutes" (J. A. 18), "about five to ten minutes" (J. A. 26-27), and, by one of appellants, to be "about five minutes" (J. A. 51).

Because the trial court was fully informed respecting the reason why, and the circumstances under which, the United States Attorney nol prossed the disorderly conduct informations filed by him, the failure to accord appellants an evidentiary hearing on whether, under the applicable common law rule, such nolle prosequis were arbitrary or oppressive was not prejudicial.

A reading of the informations makes clear that the only substantive offense charged was a violation of D. C. Code, 1961, § 22-1121. The allegation in each information that the offense occurred in the "U. S. Capitol Building" did not charge a different offense, but merely made applicable the lesser penalty provided by D. C. Code, 1961, § 22-3111. The informations are, accordingly, not fatally duplicitous.

The evidence that appellants, while in the United States Capitol, engaged in loud and boisterous singing, shouting, hand-clapping, and feet-stamping, that they threw themselves on the floor and locked arms, and that they had to be forcibly pulled apart and carried from the building fully supported their convictions of violating D. C. Code, 1961, §22-1121. The cases relied upon by appellants do not support their arguments that their First and Fifth Amendment rights were infringed. On the contrary, the law is clear (1) that appellants' conduct, under

the circumstances here involved, was not constitutionally protected, and (2) that the language of the statute is not unconstitutionally vague.

ARGUMENT

I

The Federal Rules of Criminal Procedure are not applicable in misdemeanor cases in the Court of General Sessions.

Appellants contend that the District of Columbia Court of Appeals erred in holding that Rule 48(a) of the Federal Rules of Criminal Procedure is not applicable in misdemeanor cases in the Court of General Sessions and that, since the Court of General Sessions has not adopted a comparable rule, the common law rule controls the power of the prosecutor to enter a nolle prosequi in such cases.

As is manifest from Rule 54 thereof, the Federal Rules of Criminal Procedure do not, by their terms, apply in misdemeanor cases in the Court of General Sessions; nor were they intended to do so. See 8 Moore's Federal Practice (2nd ed.) §§ 54.01 and 54.02; United States v. Foster (D. C. App., 1967), 226 A. 2d 164; United States v. Kennedy (D. C. App., 1966), 220 A. 2d 322: District of Columbia v. Weams (D. C. App., 1965), 208 A. 2d 617; Larkin v. United States, (D. C. Mun. App., 1958), 144 A. 2d 100, reversed on other grounds

(1960), 108 U. S. App. D. C. 239, 281 F. 2d 71. Cf. District of Columbia v. Huffman (D. C. Mun. App., 1945), 42 A. 2d 502.

Appellants further contend that, assuming, arguendo, the applicability of the common law rule, they were not accorded the benefit of its protection.

Under the common law rule, the prosecutor's right to enter a nolle prosequi prior to trial was "almost absolute" and was subject to judicial interference " * * * only if that right was used oppressively or arbitrarily or exercised in a manner that was scandalous, corrupt, capricious, or vexatiously repetitious." Smith v. District of Columbia, (D. C. App., 1966), 219 A. 2d 842, 844.

The record is clear (J. A. 12-13) and appellants concede (brief, p. 3) that the United States Attorney requested and was granted leave of court to nol pros the disorderly conduct informations filed by him. Appellants complain, however, that, prior to granting leave to nol pros, the trial court did not afford them an opportunity to offer " * * * evidence tending to prove that the nolle prosequi was arbitrary or oppressive * * * " (brief, p. 15).

The reason why, and the circumstances under which, the United States Attorney nol prossed the disorderly conduct informations filed by him were, however, manifest to the trial court. At the hearing on

appellants' motion to dismiss the disorderly conduct informations filed by the United States Attorney, it was urged on behalf of appellants that, since the penalty provided by D. C. Code, 1961, § 22-3111 (and 40 U. S. C. § 101), is a fine only, the proper prosecuting officer, under D. C. Code, 1961, § 23-101, is the Corporation Counsel and not the United States Attorney (J. A. 64-71). The court then recessed the hearing in order to permit representatives of the United States Attorney and of the Corporation Counsel to confer respecting the matter. When, later the same day, the hearing was resumed, the United States Attorney nol prossed the disorderly conduct informations filed by him and new informations charging appellants with disorderly conduct were filed by the Corporation Counsel. It is thus apparent that both the United States Attorney and the Corporation Counsel were persuaded to so act by the soundness of appellants' position.[3]

Under these condition, it was manifest to the trial court that the nolle prosequis by the United States Attorney were not entered under

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[3] Although not expressly spelled out in the record, it appears that the United States Attorney's initial belief that he was the proper prosecuting officer of the statute proscribing disorderly conduct in "the public buildings * * * belonging to the United States within the District of Columbia" was based on the statute's codification in 40 U. S. C. § 101. It is also codified in D. C. Code, 1961, § 22-3111.

circumstances calling for judicial intervention. An evidentiary hearing would thus have served no useful purpose. And, significantly, appellants do not here, nor did they in the court below, suggest the existence of any relevant fact, not known to the trial court, which, had they been accorded an evidentiary hearing, they might have been able to establish.

II

Because the informations charged but one substantive offense, they were not duplicitous.

Appellants contend that the District of Columbia Court of Appeals erred in holding that the informations were not duplicitous.

The three provisions of the District of Columbia Code (1961) which deal with the offense commonly referred to as disorderly conduct are § 22-1107, § 22-1121, and § 22-3111. The section or sections under which the prosecutions were brought must, of course, be ascertained from an examination of the language used in the informations and the provisions of the respective statutes.

The informations charged that appellants, on March 15, 1965:

> "* * * in a public place, to wit: U. S. Capitol Building did then and there engage in disorderly conduct, to wit: did engage in loud and boisterous talking and other disorderly conduct, to wit: under circum-

> stances such that a breach of the peace may be occasioned thereby, acted in such a manner as to annoy, disturb, interfere with, obstruct, and be offensive to others * * * ." (J. A. 83, 91, 99, 107, 115, 131, 139, 147, 155.)

Insofar as here pertinent, the statutes involved provide:

§ 22-1107

> "It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in * * * any public building * * * and engage in loud and boisterous talking or other disorderly conduct * * * under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense."

§ 22-1121

> "Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby--
>
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others * * *
>
> shall be fined not more than $250 or imprisoned not more than ninety days, or both."

§ 22-3111

> "Any person guilty of disorderly * * * conduct in * * * the public buildings * * *

> belonging to the United States within the District of Columbia * * * shall, upon conviction thereof, be fined not more than fifty dollars."

The language of the informations which charged that appellants, "* * * under circumstances such that a breach of the peace may be occasioned thereby, acted in such a manner as to annoy, disturb, interfere with, obstruct, and be offensive to others * * *," being in the language of the statute, obviously charged an offense under § 22-1121.

Notwithstanding the allegations therein that appellants "* * * did engage in loud and boisterous talking * * *," the informations did not charge an offense under § 22-1107. The offense proscribed by that portion of § 22-1107 which relates to "loud and boisterous talking" plainly consists of two elements. In order to charge an offense thereunder, it would have been necessary to allege in the informations that appellants (1) did congregate and assemble in a public building and (2) did engage in loud and boisterous talking. And this the informations plainly did not do.

The allegations in the informations that the offenses occurred in the "U. S. Capitol Building," i.e., in a public building belonging to the United States within the District of Columbia, did not charge a separate offense, but merely made applicable the lesser penalty pro-

vided by § 22-3111.[4] See Jalbert et al. v. District of Columbia (D. C. App., 1966), 221 A. 2d 94, 98, footnote 6.

It is thus apparent that the only substantive offense charged in the informations was that proscribed by § 22-1121. The holding of the court below that the informations were not duplicitous is, accordingly, eminently correct.

III

Appellants' convictions are supported by the evidence and their First and Fifth Amendment rights were not infringed.

Finally, appellants contend that the District of Columbia Court of Appeals erred in holding that the evidence was sufficient to support

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[4] The difference between the penalty provided by § 22-3111 and that provided by §§ 22-1107 and 22-1121 is obviously due to a congressional oversight. The general penalty originally provided for the disorderly conduct proscribed by § 22-1107 was a fine of not more that $25. However, if the offense occurred in a public building belonging to the United States, under § 22-3111 the penalty provided was a fine of not more than $50. (Act of July 29, 1892, 27 Stat. 322, ch. 320, secs. 5, 6, and 15.) When, in 1953, the Congress increased the penalty for violations of § 22-1107 from a fine of merely $25 to a penalty of $250 or ninety days, or both, and, at the same time, proscribed, under a like penalty, the disorderly conduct set forth in § 22-1121, it neglected, undoubtedly through inadvertance, to also increase the special penalty provided by § 22-3111 for disorderly conduct in a public building belonging to the United States. (Act of June 29, 1953, 67 Stat. 90, ch. 159, secs. 210 and 211.)

their convictions of violating D. C. Code, 1961, § 22-1121, and that their First and Fifth Amendment rights were not infringed.

Respecting the sufficiency of the evidence, appellants argue that, since they " * * * were located in an alcove * * * " and " * * * no one was in the United States Capitol save the police and several news reporters," their conduct could not have been such as to annoy, disturb, interfere with, obstruct, or be offensive to others (brief, p. 23).

The evidence (including the photographs) clearly establishes, however, that appellants were not just in "an alcove" but were blocking the hallway that leads from the Speaker's office to the House Chamber. Furthermore, appellants' assertion that only the police and newspaper reporters were in the Capitol is contrary to the record. The record shows that there were present in the "general area" where appellants were congregated not only many Metropolitan and Capitol Police Officers and newspaper reporters, but also members of the Secret Service, photographers, and "many" other people. (J. A. 10, 13, 23, 27, 33, 51-52).

As previously noted, there is no essential conflict in the record respecting appellants' conduct. After the Speaker had met and talked with them and accepted their petition, appellants remained for several hours in and around an alcove off a second floor corridor of the Capitol

where they "lay sprawled on the marble floor there." When, at about 5:45 p. m., long after the building had been closed to visitors, they were again reminded that they would have to be out of the building by six o'clock, they began to sing, to shout, to clap their hands, and to stamp their feet in a loud and boisterous manner. After this conduct had continued for some fifteen minutes, Chief Schamp order them arrested, whereupon appellants threw themselves on the floor, locked arms, and had to be forcibly pulled apart and carried out of the building.

Unquestionably, this conduct, under the conditions involved, fully supported, if it did not compel, a finding that appellants had violated D. C. Code, 1961, § 22-1121.

The cases relied upon by appellants do not support either their argument that, because " * * * they were petitioning their government for redress of grievances," their " * * * conduct could not be a basis for charging and convicting them of disorderly conduct * * * " (brief, p. 23) or their argument that the statute is " * * * to vague and indefinite to pass constitutional muster * * * " (brief, p. 24).

Appellants' conduct, like the conduct referred to in Cantwell v. Connecticut (1940), 310 U. S. 296, 310, was clearly " * * * not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no

question under that instrument." And cf. Adderley v. Florida (1966), 385 U. S. 39; Feiner v. New York (1951), 340 U. S. 315; Cox v. New Hampshire (1941), 312 U. S. 569; United States v. Miller (2nd Cir., 1966), 367 F. 2d 72; United States v. Jones (2nd Cir., 1966), 365 F. 2d 675.

In several of the cases cited by appellants, the statutes there involved were declared unconstitutional solely because of the "gloss" placed on the statutes by the State courts. See, e.g., Terminiello v. Chicago (1949), 337 U. S. 1; Edwards v. South Carolina (1963), 372 U. S. 229; Cox v. Louisiana (1965), 379 U. S. 536. And cf. Shuttlesworth v. Birmingham (1965), 382 U. S. 87. Other cases cited by appellants, such as De Jonge v. Oregon (1937), 299 U. S. 353; Cantwell v. Connecticut, supra; and Ashton v. Kentucky (1966), 384 U. S. 195, were controlled by statutes quite different from the statute here involved. As is apparent from the concurring opinion of Mr. Justice White, the decision in Brown v. Louisiana (1966), 383 U. S. 131, turned on his conclusion that the evidence showed only a "normal and authorized use of this public library." Had the evidence in Brown shown conduct even remotely resembling that here engaged in by appellants, the convictions would have been upheld. The dissenting opinion of Mr. Justice Black (concurred in by three other Justices) may thus

be considered, for the purpose of the instant case, as expressing the current views of the Supreme Court concerning the constitutionality of disorderly conduct statutes such as that here involved and the scope of the First Amendment's protection. And see Adderley v. Florida, supra.

In short, each of the cases relied upon by appellants to support their constitutional-infringement arguments is plainly distinguishable either on the facts, the law, or both.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the District of Columbia Court of Appeals is in all respects correct and in accordance with law and should, therefore, be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,279

DAVID A. SMITH, et al,

Petitioners

v.

DISTRICT OF COLUMBIA,

Respondent

PETITION FOR RECONSIDERATION EN BANC OF DENIAL OF PETITION FOR ALLOWANCE OF APPEAL

On Petition For Allowance of Appeal From
The District of Columbia Court of Appeals

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DAVID A. SMITH, et al, Petitioners	)	
v.	)	No. 20,279
DISTRICT OF COLUMBIA, Respondent	)	

Come now the petitioners herein, by counsel, and petition this Honorable Court, pursuant to Rule 10 of this Court's Rules Governing Appeals from the District of Columbia Court of Appeals and pursuant to Sections 43(b) and 46(c) of Title 28, United States Code, for reconsideration en banc of its Order entered herein on 7 November 1966 denying the Petition for Allowance of Appeal which sought review of the decision of the District of Columbia Court of Appeals in Smith v. District of Columbia, 219 A.2d 842. As grounds for this Petition, it is submitted:

1. The Petition for Allowance of Appeal herein raises grave and important issues of substance involving fundamental constitutional rights, invoking the exception that en banc courts "should be convened 'only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.' United States v. American Foreign S. S. Corp., 363 U.S. 685, 689, 80 S. Ct. 1336, 1339, 4 L.Ed. 2d 1491 (1960)." Earl v. United States, 364 F.2d 666 (U. S. App. D. C., 1966).

2. The Petition for Allowance of Appeal should be granted for the following reasons:

(a) The holding by the District of Columbia Court of Appeals in the instant case that the District of Columbia Court of General Sessions, having failed to adopt the counterpart of Rule 48(a) of the Federal Rules of Criminal Procedure which requires that leave of court be first obtained before the prosecuting officer may enter a nolle prosequi, is guided by the dictates of the common law rule which confers not absolute power upon the prosecutor to nol-pros informations in criminal prosecutions in that Court, but "almost absolute" power, subject only to judicial restraint if that right is arbitrarily or oppressively used, involves questions of general importance and substance relating to the construction and application of those Rules as between that court and the United

States District Court for the District of Columbia, which have not been but should be settled by this Court.

To the extent that the Federal Rules of Criminal Procedure are held to represent the codification of constitutional principles of due process of law and national policy for application in criminal proceedings in federal courts, the decision by the court below, which denies the application of those minimum safeguards to defendants in criminal proceedings in the District of Columbia Court of General Sessions in the absence of that court's formal adoption of any of those Rules, condones a lesser or different standard of due process in the D.C. Court of General Sessions, than obtains in the United States District Court. Thus, a defendant in a criminal case in two courts having concurrent jurisdiction in certain cases, is afforded procedural safeguards in one court by virtue of the operative effect of the Federal Rules of Criminal Procedures, which are denied him in the other court simply because the second court has not expressly adopted the counterpart of such Rules. See United States v. Kennedy, 220 A.2d 322 (D.C.C.A. June 17, 1966).

This Court, exercising supervisory jurisdiction over both trial courts, has not but should resolve this apparent denial of equal protection and due process of law. See Hurd v. Hodge, 334 U.S. 24, 34-36.

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This Court, exercising supervisory jurisdiction over both trial courts, has not but should resolve this apparent denial of equal protection and due process of law. See Hurd v. Hodge, 334 U.S. 24, 34-36.

(b) The District of Columbia Court of Appeals in affirming the trial court's determination that it had no authority nor discretion to refuse the prosecuting attorney's entry of a nolle prosequi and in the same opinion holding that the prosecuting attorney's right to enter a nolle prosequi was subject to interference by the trial court if that right were used oppressively or arbitrarily or in a manner that was scandalous, corrupt, capricious, or vexatiously repetitious, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court, as to call for an exercise of this court's power of supervision.

The trial judge unequivocally abjured authority or discretion to "interfere with the Government action on nolle prossing" (Tr.76) and afforded petitioners no opportunity to present evidence or argument to invoke the authority the court below held existent to determine whether the Government's action in nolle prossing were used oppressively or arbitrarily or in a manner that was scandalous, corrupt, capricious, or vexatiously repetitious." However, the court below, upon its independent examination of a record in which petitioners were denied an opportunity to establish a basis for exercise of the authority and discretion which the trial court denied it possessed, found that such basis did not

exist -- in effect, affirming a determination the trial court did not make.

(c) In holding that the single count informations in this case were not duplicitous and therefore fatally defective, notwithstanding the prosecutor who drew the informations and tried the cases clearly and unequivically stated to the trial court his intent and purpose to charge and try petitioners with violation of two separate and distinct criminal statutes (R. 6-7) -- a fact in the record which both the opinion below and the Government's briefs choose not to mention, the court below has decided a question of substance not theretofore determined by this Court; contrary to a decision by the United States District Court for the District of Columbia in United States v. Bachman, 164 F. Supp. 898, 900 (1958); and contrary to general law. See Murdock v. State, (Tex. Crim. App. 1907), 106 S. W. 375.

(d) The court below, in holding that the only offense charged in the information herein was that proscribed by D. C. Code 1961, § 22-1121, notwithstanding a contrary expressed intent by the prosecutor and the apparent understanding of the Chief Judge in sentencing a defendant charged with petitioners who entered a plea of "Guilty" (R.80) and the trial judge in sentencing petitioners (R.61) for violation of D. C. Code 1961,

§22-3111, has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Left standing, if this Court does not review and apply its supervisory and corrective process to the decision by the court below, is an apparent holding that a prosecutor may charge and the defendant may be tried and found guilty and sentenced by the trial court for a violation of one provision of the District of Columbia Code and, on appeal, have a determination made that the defendant was convicted for a separate and distinct violation.

(e) The court below, in holding that petitioners were charged and convicted for a violation of D. C. Code 1961, §22-1121 including the essential element that their conduct did "annoy, disturb, interfere with, obstruct or be offensive to others"--to wit, that petitioners "lay on the floor and engaged in hand-clapping, song-singing, foot-stamping, and shouting," (219 A. 2d 842, 845, 846), has decided a question of substance not theretofore determined by this Court; and in a way contrary to decisions of the Supreme Court of the United States. See Cox v. Louisiana, 379 U.S.536 (1965); Fields v. South Carolina, 375 U.S. 44 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); and Brown v. Louisiana, 83 S.Ct. 719 (1965).

In other words, the specific conduct alleged and, for the sake of argument, proved, could not be constitutionally proscribed by the statute, therefore, the record failing to show and the court not finding any other conduct which could be constitutionally proscribed by the the statute, petitioners convictions would be in violation of the Due Process Clause of the Fifth Amendment. Thompson v. Louisville, 362 U. S. 199 (1960).

(f) And for the other and further reasons set forth in Petitioners' Brief in Support of Petition for Allowance of Appeal herein.

WHEREFORE, counsel for petitioners certifying that this petition is presented in good faith and not for delay, petitioners request that the Court, en banc, reconsider and set aside the Order of 7 November 1966 denying their Petition for Allowance of Appeal and that the said Petition be granted.

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CERTIFICATE OF SERVICE

I hereby acknowledge service and receipt, this 15th day of November 1966, of a copy of the foregoing Petition for Reconsideration En Banc of Denial of Petition for Allowance of Appeal.

CORPORATION COUNSEL FOR THE
DISTRICT OF COLUMBIA

By _____
Assistant Corporation Counsel
Attorney for Respondent